IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

Suit no.830 of 2004

Jayantilal Vithaldas Pabari)
Adult, aged about 60 years)
Indian Inhabitant of Bombay)
and carrying on business)
under the name and style of)
"Nilesh Circulating Library")
having folder licence no.)
1412, situated at Rani Sati)
Marg, near Krishna Kunj and)
Navjeevan High School,Malad)
(E), Mumbai 400 097) ..Plaintiff

vs.

The Municipal Corporation of)
Greater Bombay, a corpora-)
-tion duly constituted under)
the Bombay Municipal)
Corporation Act, 1881 and)
having their registered)
office situated atMahapalika)
Sadan, Mahapalika Marg,)
Mumbai 400 001) ...Defendant

Mr.Mukesh Pabari for plaintiff
Mr.H.C.Pimple for defendant.

CORAM: S.C.DHARMADHIKARI J.
27th/31st August, 2007

ORAL JUDGMENT:

1. This is a suit claiming damages from the Municipal Corporation of Greater Mumbai for unauthorised and illegal demolition of the premises of the plaintiff.

2. The plaintiff is a handicapped person. He was permitted to put up stall admeasuring 1 meter x 1 meter and licence was issued to him bearing no.1412. The plaintiff was carrying on business in the name and style of M/s Nilesh Circulating Library from the premises which are more particularly described in para 2 of the plaint.

3. It is the case of the plaintiff that his was the duly authorised and licensed stall and licence fees were paid from the date of issuance of the licence till it was unauthorisedly and illegally demolished. The licence was renewed as well.

4. The plaintiff states that he was carrying on business of selling religious and other books from the stall. It is his case that when all charges and expenses pertaining to the stall were duly collected by the defendants, then, the stall could not have been demolished and removed.

5. The defendant before me is the Municipal Corporation of Greater Mumbai set up and established under the Mumbai Municipal Corporation Act, 1888. Amongst other duties and obligations it has to remove all the obstacles and impediments in the smooth flow of traffic so also for preserving and protecting safety of the residents. In

other words, while regulating and controlling the development and construction activities, the Corporation has to ensure that public interest and public safety is not sacrificed.

6. It is the case of the plaintiff that on 5th August, 2000 without prior intimation and notice the ward officer Shri G.K.Khairnar, the then Authorised Officer of the defendant came to the suit premises and demolished them so also seized and removed the goods and articles therefrom. The plaintiff complained about this high handed act and by approaching the police station but the officer on duty refused to register the offence. He was advised to approach the Municipal Corporation. The plaintiff thereafter moved the Municipal Corporation and complained about the illegal and unauthorised demolition. He requested the Ward Officer to pay interim compensation or else re-erect the stall at the costs of the Corporation when both requests were turned down he had to approach the higher authorities. The higher authorities did not respond and, therefore, the plaintiff issued a notice through his Advocate on 19th August, 2000. Thereafter, he filed writ petition in this Court being Writ Petition No.2301 of 2000 and this Court after hearing both sides passed an order declaring that demolition was totally

illegal and the plaintiff was allowed reconstruction of the stall.

7. It is the grievance of the plaintiff that he was not present when the order was passed and that is why he applied for modification/recall/review of the order. However, this Court was of the view that only relief that can be granted in the writ petition was reconstruction of the stall and for other reliefs he must move proper Court.

8. Thereafter notice was issued under sec.527 of the M.M.C.Act, 1888. After expiry of the notice period, the suit was filed initially as a pauper petition and subsequently it was converted into suit being suit no.830 of 2004.

9. This Court framed the issues on 3rd August, 2006 in the light of the pleadings. Needless to state that after the suit was filed the writ of summons was duly served on the Corporation and it filed its written statement. The issues framed and settled in the light of the pleadings read as under:

1. Does defendant prove that the suit is barred by law of limitation?

2. Does defendant prove the suit is barred by principles of resjudicata?

3. Does plaintiff prove that the suit stall was authorised?

4. Does plaintiff prove that stall was licensed stall and had shown the licence to the defendant at the time of action/incident?

5. Does plaintiff prove that defendant demolished the stall unauthorisedly?

6. Does plaintiff prove that the defendant had damaged the books and also took away some books?

7.Does defendant prove stall is unauthorised?

8. Does defendant prove while they demolished the stall books are never damaged by them?

9. Does defendant prove books were left at site?

10. Do defendants prove that they legally demolished the stall?

11. Is plaintiff entitled to the damages as claimed?

12. What order and relief?

10. My findings on the above issues are as under:

Issue No. 1 : In the Negative.

Issue No. 2 : In the negative.

Issue Nos. 3: Already answered by the Division Bench.

to 5 and :

7 and 10 :

Issue No.8 : In the negative
and 9 :

Issue Nos.6 : In the negative. As far as issue no.6
and 11 : and partly as far as issue no.11.

11. The plaintiff has stepped into the witness box. He filed his affidavit in lieu of examination in chief in which he has reiterated the grievance and has also stated that the contents of the documents produced collectively as Exh.B, Exh.B-1 and Exh.B-2 are true and correct. He also produced some photographs, however, the learned Advocate appearing for the plaintiff fairly states that apart from examining himself the plaintiff has not examined any other witness. Hence, there are no details with regard to the studio/photographer who had clicked the photographs nor there are any documents evidencing payment to him which are produced on record. Thus, all that is exhibited are licences and receipts evidencing payment and the copy of the complaint made to the police station and the Municipal Authorities so also the Advocate’s notice.

12. It appears that the plaintiff made a complaint with regard to the demolition by his letter dated 7th August,

2000 which was addressed to the Ward Officer, P/North Ward of the defendant, but the said office informed the plaintiff that demolition is not carried out by the said ward staff.

13. Thereafter on 10th August, 2000, the plaintiff addressed a letter to the concerned officer Shri G.K. Khairnar complaining about the illegal demolition and demanded a sum of Rs.2,00,000/- as compensation. Since this letter met with no response, another notice through Advocate was issued on 19th August, 2000 and ultimately, a writ petition was filed in this Court being writ petition no.2301 of 2000. In the writ petition, the defendant was made a party and plaintiff complained that the stall was demolished illegally and without notice. After hearing both sides, Division Bench passed the following order.

> "(a) The petitioner is permitted to reconstruct a stall of the same dimensions at the same site and use and occupy the same forthwith.
>
> (b) The respondent shall not take any action against the petitioner inrespect of the said stall without first giving him notice and a reasonable opportunity of being heard. If the respondents

pass any order adverse to the petitioner, the same shall not be implemented for a period of 12 weeks from the date of communication of the order to the petitioner.

(c) Rule made absolute in the aforesaid terms."

Thereafter the plaintiff filed a review petition with regard to his claim for damages by way of Notice of Motion but he was directed to file appropriate proceedings while rejecting the same. It is thereafter that the notice under sec.527 was served and the suit was filed. Initially, on account of his financial difficulties the plaintiff filed the suit as a pauper and lateron after the proceedings were converted into the present suit.

14. The written statement of the defendant after having served with the writ of summons raises principally two defences. First submission/contention is that the stall was removed by the then Officer on Special Duty on 5th August, 2000 whereas the present suit is filed on 15th March, 2004. After referring section 527(1)(b) of the M.M.C.Act, it is contended that the suit ought to have been filed within a period of six months from the date of accrual of the cause of action. It being filed nearly

four years thereafter, is patently time barred. In such circumstances, the same be dismissed on this ground alone.

15. With regard to the merits, the contention is that the claim for damages would not survive in as much as the articles and books which were lying in side the stall were never taken away by the encroachment squad. All allegations with regard to the damage caused to the articles and books have been denied. It is contended that the claim for damages with regard to the books and articles are not tenable because the same may have been damaged in their ordinary and regular wear and tear. That has nothing to do with the demolition/removal of the stall. In any event this claim is barred by resjudicata.

16. Without prejudice to the above, it is contended that except the photographs of the stall which do not contain any books, no evidence has been adduced before this Court to prove the claim for damages. With regard to the claim towards reconstruction costs in para 5(a) of the written statement this is what is stated:-

> "5(a). The defendants say that the removal action against the squatter stall of the plaintiff was taken by the squad of the then O.S.D., W.O.R.E.

Shri G.R.Khairnar on 5.8.2000. The defendants say that the said action was taken against the squatter stall as the said stall was situated on Rani Sati Marg and it was causing nuisance to the pedestrian passing and re-passing on the footpath. The defendants say that when the action was taken by the squad of O.S.D. W.O.R.E. on 5.8.2000 at that time the squatter licence was not shown to the officers of the Corporation. the defendants say that the removal action was not taken by the officers of P/North ward but it was taken by the squad of O.S.D. W.O.R.E. and the officers of the said squad were not aware about the squatter licence no.1412 which has been granted to the said stall. If the licence had been shown to the officers of the said squad, they would not have taken removal action against the said stall. The defendants say that the plaintiff has written a letter dated 7.8.2000 to the Ward Officer P/North ward calling upon him to pay Rs.10,000/- being interim compensation. The defendants say that in reply to the said letter the Ward Officer P/North Ward has sent a letter dated 18.9.2000 bearing No.WOPN/14739/licence to the plaintiff and he was informed by the said letter that the stall of the

plaintiff has not been demolished on 5.8.2000 by the staff of P/North ward. The defendants say that since the action was not taken by the Ward staff of P/North ward and it was taken by squad of W.O.R.E. Ward Officer/North ward has bsent the said reply to the plaintiff."

17. The claim of the plaintiff under several heads read thus:

Cost of redconstruction of stall (material)	Rs.	10,000.00
Labour Charges	Rs.	5,000.00
Electrician charges	Rs.	2,000.00
Furniture in stall	Rs.	10,000.00
Cash lying in stall	Rs.	1,000.00
Damages for the period 5.8.2000 to 30.3.2001 shop closed from the date of		

demolition (Rs.300/- per day 6 months)	Rs. 54,000.00
Goods taken away/seized by the defendant	Rs.1,20,000.00

	Rs.2,00,000.00

18. The plaintiff led his evidence by way of affidavit in lieu of examination in chief. In his cross examination the plaintiff states thus:

> "I was not present when the shop was demolished on 5/8/2000. I have not produced the purchase bills with regard to the books. My business was selling the books and also books library. I was not keeping any accounts. I was not maintaining registers with regard to the library.
>
> "My shop was demolished on 5.8.2000. My shop was 1 mtr. x 1 mtr. I was keeping the books inside the shop as well as outside. The witness volunteers that outside means on the door of the shop. I had filed police complaint inthe evening when I came to

know about the removal of my shop. I had not applied to the BMC for getting the materials back. I had approached the BMC office. It is not true that the BMC has not taken away any books. It is not true that I have filed false complaint."

19. On behalf of the defendants one Moreshwar Mahadeo Kale stepped into the witness box. He states that he has been working with the encroachment removal department (Western Suburbs) fro October, 2002. He has deposed about the demolition/removal action and stated that books, electricity meters and other articles were never damaged. In fact, the size of the stall, according to him, is that all the articles cannot be accommodated therein. His affidavit in lieu of the examination in chief was tendered and he was made available for cross examination. The cross examination of this witness discloses that he was not the officer concerned nor was he posted in the subject department when the stall was demolished. Therefore, his deposition is of no assistance.

20. The learned Advocate appearing for the plaintiff submitted that the stall has been illegally and unauthorisedly demolished. This is a case where the plaintiff who has been carrying on small business in an

authorised and legally permissible stall has been deprived of his livelihood by the defendant. He submits that the entire action is violative of the provisions of the Act and Articles 14 and 21 of the Constitution of India. He submits that it is clear that there is no notice prior to removal/demolition. Further, there is no panchanama drawn. In such circumstances, the claim for damages survives.

21. In sofar as the issue of limitation is concerned, it is contended that the suit claim is within limitation because the suit notice was issued on 10th February, 2003 and the suit was filed on 9th May, 2003. He submits that the suit has been instituted pursuant to the liberty granted by this Court while disposing of the writ petition and, therefore, it cannot be said to be barred by limitation. He submits that even the claim for damages made is not barred by resjudicata because section 11 of the Code of Civil Procedure with relevant explanation has no application to the subject matter of the suit.

22. It is contended that the licence was issued in the year 1979 and licence fees were being paid regularly. This is not a case where the stall was erected overnight without any permission or authority. Merely because the

plaintiff was not present at the site of demolition does not mean that the entire version of the plaintiff is to be disbelieved, more so, when demolition is illegal and unauthorised is admitted fact. It is contended that the stall is reconstructed pursuant to the liberty granted by this Court and, therefore, the cost and damages as claimed should be granted.

23. The defendant's Advocate has contended that there is no evidence led and, therefore, the suit deserves to be dismissed. There is no proof with regard to any of the claims. Save and except filing the receipt for construction cost in the form of fabrication worth Rs.7000/- there is absolutely no evidence which is led with regard to other claims. In such circumstances, the suit deserves to be dismissed in toto.

24. After hearing both sides, in my view, the issues that would survive for my consideration after the Division Bench order are whether the suit claim is within limitation, whether the suit is barred by resjudicata as contended by the defendant and whether the claim for damages can be awarded.

25. With regard to the issue of limitation, my finding is

that the claim is not barred by law of limitation. The period of limitation is prescribed under section 527(1)(b) of the M.M.C.Act. In the facts of this case the suit claim cannot be said to be time barred. Admittedly, the suit is filed within the period prescribed by law after the liberty granted by the Division Bench. All reliefs were claimed in the writ petition. This Court concluded that the demolition is illegal but declined other reliefs after granting liberty to institute appropriate proceedings. Thus, the claim for damages was not entertained but leave was granted to file appropriate proceedings. It is not the case of defendants that the suit is filed after the priod of six months had elapsed from the order of Division Bench in Review Petition. Hence, there is no substance in the contention that the suit is filed after nearly 4 years of demolition is, therefore, barred by limitation. Similarly, the suit claim is not barred by principles of resjudicata in as much as no material is produced to show as to which explanation of sec.11 would govern the claim in the instant suit. Further, the claim being reserved by this Court it would not be fair, just and proper to reject the same on any technical ground.

26. However, with regard to the claim made for damages

and recovery of other costs pertaining to reconstruction material, in my view, the same cannot be granted in toto.

27. My reasons for the said conclusion are these.

28. I have perused with the assistance of the learned Counsel appearing for both sides the oral and documentary evidence on record.As stated above barring the licence and receipts evidencing the payment of licence fees so also the copies of the complaints made to the Municipal Authorities and police, there is nothing on record to support the claim. The photographs would not be enough to justify awarding the claim as made. This is a clear case where the plaintiff came to this Court and was more or less satisfied with the relief granted in his favour by the Division Bench in the writ petition, namely, declaring that the action was illegal and unauthorised and permitting reconstruction at the costs of the petitioner if the defendant/respondent failed to do so. Therefore, taking into consideration the totality of the facts and circumstances and bearing in mind that the source of livelihood was taken away in a most objectionable manner by the defendant, all that can be awarded is a lumpsum cost of reconstruction. That claim is of Rs.10,000/- It

is contended that Rs.10,000/- is only cost of material which was used while rebuilding or reconstructing the stall and the plaintiff had to incur the labour charges of Rs.5000/- so also restore the electricity supply.

29. The version of the plaintiff in this behalf is that he reconstructed the stall. That he reconstructed the stall is a fact which is not disputed. The Division Bench has permitted reconstruction as is clear from the order passed in that behalf. The plaintiff is a handicapped person and has been in possession and use of the stall for considerable length of time.

30. Taking over all view of the matter, in my view, costs of reconstruction of the stall, labour charges and electricity supply charges are the only claims which can be awarded. For rest of the claims neither there is any evidence nor is the plaintiff able to justify the amount claimed.

31. In such circumstances, all that can be granted is a decree in favour of the plaintiff in the sum of Rs.17,000/- with interest at 8% p.a. from the date of demolition till repayment. The suit is decreed in the above terms with costs. Costs quantified at Rs.5000/- At

the request of the defendant 8 weeks time is granted to pay the amount as decreed. The decree be drawn up accordingly.

(S.C.DHARMADHIKARI J.)